

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

In re Thomas A. Guiseppe,

Debtor.

Case No. 03-67175

Chapter 7

Hon. Marci B. McIvor

OPINION GRANTING IN PART AND DENYING IN PART FIRST INTERIM FEE
APPLICATION OF ATTORNEYS FOR TRUSTEE, KUPELIAN ORMOND & MAGY P.C.
FOR SERVICES RENDERED JULY 1, 2004 THROUGH NOVEMBER 30, 2005

This matter is before the Court on the First Interim Fee Application of Attorneys for Trustee Kupelian Ormond & Magy P.C. for Services Rendered July 1, 2004 through November 30, 2005. The application seeks fees of \$65,094.50 and costs of \$4,683.86 for a total award of \$69,778.36. An objection to the application was filed by creditor Thomas Moses. Having reviewed the pleadings and the record, the Court grants fees in the amount of \$56,660.75 and costs in the amount of \$4,683.86 for a total award of \$61,344.61.

Facts

Suffice it to say, this case has a long and tortured history, only some of which is relevant here. Debtor Thomas Guiseppe filed a voluntary Chapter 7 bankruptcy petition on October 2, 2003. Fred Dery was appointed the Chapter 7 trustee. On July 15, 2004, this Court entered an Order authorizing the Trustee to employ Kupelian Ormond and Magy, P.C. as counsel for the Trustee. Shortly after the appointment of Kupelian, Kupelian (hereinafter referred to as "Trustee") determined that Debtor's main asset was his interest in an entity known as Back Street, Inc. The Trustee filed a Motion for Substantive Consolidation of the assets of Debtor and Back Street. The Motion was opposed by

creditor Thomas Moses ("Moses"). On October 20, 2004, the Court entered a stipulated Order Granting the Motion for Substantive Consolidation.

After the consolidation, the Trustee filed a Motion to Sell Property, Motion to Sell Liquor License at an Auction Sale and Motion for Order Approving Auction Sale. Those Motions were vigorously opposed by Debtor and/or Robert Cortis, a party claiming an interest in the assets of Back Street.

In addition to the Motions, the Trustee filed adversary proceedings in the bankruptcy seeking to avoid fraudulent conveyances. As explained in the Application for Fees presently before this Court:

Applicant discovered that immediately after the entry of the state court judgment [in favor of Moses against Debtor], Debtor took action to make himself 'execution proof' by transferring all of his property to third parties. These actions gave rise to claims that may be asserted by the Trustee to avoid fraudulent transfers and/or preferential transfers. Applicant researched applicable bankruptcy and state laws concerning the claims to be asserted by the Trustee against the transferees of Debtor's property, and developed legal strategy to commence adversary proceedings for such purpose. Applicant drafted complaints and other pleadings to prosecute the Trustee's claims, and filed two (2) adversary proceedings designed to avoid fraudulent transfers and/or preferential transfers.

While the bankruptcy case was pending, Moses was also attempting to collect on a pre-petition state court judgment against Debtor by pursuing a complaint in Wayne County Circuit Court against Robert Cortis, RJMC and other parties to whom Debtor had transferred assets immediately prior to bankruptcy.¹ That action concluded when Cortis

¹ Moses also filed several claims against Debtor in the bankruptcy. Those claims total \$1,254,277.50. To the extent the claims are not paid through the bankruptcy, they have been determined to be non-dischargeable obligations of the Debtor. (Adversary Proceeding # 04-4006, Docket # 52).

agreed to pay Moses \$125,000 pursuant to a mediated settlement. The settlement proceeds were paid directly to the Chapter 7 trustee because this Court found that the \$125,000 award against Cortis *et. al.* was a settlement for the value of the assets fraudulently conveyed by Debtor to Cortis/RJMC. Because those assets were Debtor's assets, the value of those assets was property of the estate.

On December 8, 2005, the Trustee filed the present fee application. On December 21, 2005, Thomas Moses filed an objection to the application.

This case involves complicated facts and extremely contentious and litigious parties. Nearly every action taken by the Trustee in this case gave rise to objections. By necessity, the Trustee was forced to commit extensive time and resources protecting the interests of the estate.

Analysis

A. Jurisdiction

This is a core proceeding under 28 U.S.C. § 157(b)(2)(A), over which this Court has jurisdiction pursuant to 28 U.S.C. §§ 1334 and 157(a).

B. Standard for Awarding Fees

A court has the duty to review all fee application, regardless of whether an objection has been filed, in order to protect the assets of the estate for the benefit of the creditors. 11 U.S.C. § 330(a)(2); *In re Bush*, 131 B.R. 364, 365 (Bankr. W.D. Mich. 1991). A bankruptcy court has broad discretion in determining fee awards. *Manufacturers Nat'l Bank v. Auto Specialties Mfg. Co. (In re Auto Specialties Mfg. Co.)*, 18 F.3d 358 (6th Cir. 1994).

Section 330(a)(1) of the Bankruptcy Code provides that the court may award an attorney reasonable compensation for actual, necessary services rendered. 11 U.S.C.

(a)(1). Section 330(a) provides, in pertinent part:

(1) After notice to the parties in interest and the United States Trustee and a hearing, and subject to sections 326, 328, and 329, the court may award to a trustee, an examiner, a professional person employed under section 327 or 1103 --

(A) reasonable compensation for actual, necessary services rendered by the trustee, examiner, professional person, or attorney and by any para-professional person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

(2) The court may, on its own motion or on the motion of the United States Trustee, the United States Trustee for the District or Region, the trustee for the estate, or any other party in interest, award compensation that is less than the amount of compensation that is requested.

(3) In determining the amount of reasonable compensation to be awarded, the court shall consider the nature, the extent, and the value of such services, taking into account all relevant facts, including

(A) the time spent on such services;

(B) the rates charged for such services;

(C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;

(D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue or task addressed; and

(E) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for --

(i) unnecessary duplication of services; or

(ii) services that were not --

(I) reasonably likely to benefit the debtor's estate; or

(II) necessary to the administration of the case.

* * *

To summarize, 11 U.S.C. § 330 (a) requires that the requested fees must meet three conditions. The fees must be: (1) reasonable; (2) incurred for services that were actually rendered; and (3) incurred for services that were necessary. *In re Allied Computer Repair, Inc.*, 202 B.R. 877 (Bankr. W.D. Ky. 1996).

The Sixth Circuit has adopted a "lodestar method" for actually applying the requirements set forth in § 330. *In re Boddy*, 950 F.2d 334, 337 (6th Cir. 1991). The lodestar method requires that the court first determine a reasonable hourly rate and then multiply the rate times the reasonable number of hours expended to perform actual, necessary services. The court may "then determine whether a global reduction or enhancement of the fees is in order." *In re Atwell*, 148 B.R. 483, 492-93 (W.D. Ky. 1993). The ability to review fee applications in the context of each individual case "permits the Court to balance the following two competing interests: (1) rewarding the attorney practicing bankruptcy on a level commensurate with other areas of practice; against (2) the need to encourage cost-conscious administration." *Allied Computer Repair, Inc.*, 202 B.R. at 884-85. The burden of proof is on the applicant to justify the requested fees. *In re*

Hamilton Hardware Co., 11 B.R. 326 (Bankr. E.D. Mich. 1981).

After a careful review of the fee application, the Court finds that the majority of the fees requested constitute reasonable compensation for actual and necessary services. Thomas Moses does not take issue with the reasonableness of the Trustee's fees nor does he take issue with the fact that the Trustee's services were necessary to marshal and preserve the assets of the estate. The essence of Moses' argument appears to be that the Trustee's services provided no benefit to the estate because most of the assets in the estate resulted from Moses' efforts. This argument reflects a fundamental misunderstanding about the bankruptcy process and the role of a Chapter 7 trustee in that process.

One of the central purposes of bankruptcy is to provide for uniform treatment to similarly situated creditors and to prevent the proverbial race to the courthouse. *In re Holland*, 151 F.3d 547, 550 (6th Cir. 1998), *quoting In re Miller*, 198 B.R. 500, 505 (Bankr. N.D. Ohio 1996). The duties of the Chapter 7 Trustee are set forth in 11 U.S.C. § 704. That section provides in part:

The Trustee shall—

- (1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;
- (2) be accountable for all property received;
- (3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;
- (4) investigate the financial affairs of the debtor;

...

11 U.S.C. § 548 (a)(1)(A) specifically provides for the trustee to pursue fraudulent conveyances made by the debtor prior to filing bankruptcy. That section states:

The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted;

In the instant case, the Trustee's fee application covers: (1) collecting and reducing to money the property of the estate (filing the Motion for Substantive Consolidation, filing the Motion to Sell Assets, pursuing accounts receivable owed to Back Street, Inc.); and (2) investigating the financial affairs of the Debtor (investigating and filing fraudulent conveyance actions and eventually compromising those actions for a substantial sum of money). The services were necessary, reasonable (for the most part) and conferred substantial benefit on the estate.²

The fact that creditor Moses was of assistance in collecting some of the assets is immaterial. Moses chose to continue to collect on *his* state court judgment against the Debtor *after* the Debtor filed for bankruptcy. While his state court action was taken against the parties to whom the Debtor had fraudulently conveyed his assets (Cortis, *et. al.*), the sole purpose of the action was to recover money damages to satisfy Moses' underlying

²It appears that the Trustee will have approximately \$168,000 to distribute to creditors.

judgment against the Debtor. Thus Moses' action was at cross purposes with the purpose of the Bankruptcy Code and the duties of the Chapter 7 Trustee. The Code requires the Trustee to marshal assets for the benefit of all creditors. Moses was attempting to collect what he could in the Chapter 7 case (by filing a claim against the Estate) while continuing his attempts to collect on his judgment against the Debtor *outside* bankruptcy. Once a debtor files for bankruptcy a creditor is barred by the automatic stay (11 U.S.C. § 362) from continuing to collect on a pre-petition debt. The cause of action which Moses continued to pursue against the recipients of Debtor's fraudulent conveyances belonged to the Chapter 7 Trustee. The proceeds of the settlement of the fraudulent conveyance action belong to Debtor's estate. Moses pursued the state court fraudulent conveyance action by choice; the fact that the settlement conferred a benefit on Debtor's estate does not in any way defeat the Trustee's position that his fees were reasonable and necessary.

In conclusion, the Court rejects the argument that a creditor's assistance in recovering assets for the bankruptcy estate prevents a trustee from asserting that the trustee's services have provided a benefit to the estate. It is the trustee who has the statutory obligation to marshal assets. If the trustee marshals substantial assets, a benefit has been conferred.

The Court finds, however, that the Trustee billed excessive amounts for a small number of services listed in the fee application. The Court takes no issue with the fee application for services rendered from July 1, 2004 through April 29, 2005. During that period, the Trustee was consolidating assets of the estate, attempting to determine the ownership of the liquor license, and selling assets. As stated above, every motion filed by

the Trustee was contested by some party, making these duties substantially more labor intensive than they would have been in most other cases.

After April 29, 2005, the Trustee spent a very substantial amount of time on the fraudulent conveyance actions. Between April 29, 2005 and July 22, 2005, 43.5 hours were spent drafting and researching the fraudulent conveyance actions against Robert Cortis, RJMC and Martin Bordoley. This does not include any time billed for phone calls, conferences with any of the parties, attending hearings, or reviewing the Defendants' Answers and Affirmative Defenses. Given the Trustee's familiarity with the facts of this case by the time the fraudulent conveyance actions were filed, and the fact that the legal basis for the adversary proceedings filed was not substantially different from any other fraudulent transfer action, this amount is excessive. The Court is cutting the time spent on researching and drafting the Complaints by 50% to 21.75 hours. Since the majority of the work was done by Terrence Hiller at a billing rate of \$195 per hour, fees will be reduced by \$4,241.25.

Similarly, the amount of time spent researching and drafting the Trustee's Response to Cortis's Motion to Stay Enforcement of State Court Judgment and the Trustee's Motion to Compromise, is excessive. The Court acknowledges that these were probably issues of first impression for the Trustee (i.e. the legal effect of a mediated settlement in state court on a trustee's motion to compromise a similar cause of action in bankruptcy). Nevertheless, the time spent on legal research is excessive.³ The Court is

³These services were performed between September 8, 2005 and November 1, 2005.

cutting the amount of time spent on researching and drafting these pleadings (43 hours) by 50%. The Court is not cutting any fees for letter, telephone calls, pleadings filed in response to objections to the Trustee's motion or court time. The Court finds that 21.5 hours rather than 43 hours is a reasonable amount of time for legal research and drafting the Response to Cortis's Motion to Stay Enforcement and the Trustee's Motion to Compromise. At Mr. Hiller's billing rate of \$195 per hour, fees for these services are reduced by \$4,192.50 for legal work performed between September 8, 2005 and November 1, 2005.

Conclusion

For the reason stated in this Opinion, the First Interim Fee Application of Attorneys for the Trustee, Kupelian Ormond & Magy P.C. For Services Rendered July 1, 2004 through November 30 2005 is granted in part and denied in part. The Court hereby awards fees in the amount of \$56,660.75 and costs in the amount of \$4,683.86 for a total award of \$ 61,344.61.